IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 53 OF 2002.

1. Vinayak Uttam Tari,
   r/o H. No. 357,
   Kiranpani, Palyem,
   Pernem.
2. Krishna Uttam Tari,
   r/o H. No. 153, Sada,
   Vasco, Native of Kiranpani,
   Pernem. ... Appellants.

Versus

State. ... Respondent.

Mr. S.D. Lotlikar, Senior Advocate with Miss S. Dessai, Advocate for the Appellants.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 22nd August 2003.

ORAL JUDGMENT.

The appellants/original accused 1 and 2, who are convicted for an offence punishable under Sections 367 and 323 read with Section 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a term of 3 years and to pay fine of Rs. 1,000/- each respectively, by the Additional Sessions Judge, Mapusa, by Judgment, dated 25th November 2002, in Sessions Case No. 50 of 2000, have filed the present appeal challenging their conviction and sentence.

2. The facts in brief as are necessary for the decision of the appeal are set out hereunder:-

P.W.11 Dy.S.P. Mohan Karekar was in charge of the Pernem Police Station. On 10th March 2000, at about 9.45 p.m., P.W.1 Sahadev Naroji complained that his son P.W.2 Satyawan Naroji was taken from the house on the pretext of repairing a maruti van and, after reaching the said maruti vehicle, P.W.3 Vinod Naroji, brother of P.W.2 Satyawan was assaulted and P.W.2 Satyawan was forcibly taken in the said vehicle towards Karaswaddo. On being informed about this complaint, P.W.11 Dy.S.P. Karekar deputed P.W.8 P.S.I. Mohan Kasar to search the victim and the vehicle. P.W.11 Dy.S.P. Karekar immediately rushed to the scene of offence. While he was at the scene of offence, P.W.2 Satyawan was brought to his house by a relative of P.W.2 Satyawan in an unconscious condition. P.W.2 Satyawan was immediately sent for medical treatment. Complaint of P.W.1 Sahadev, at Exhibit 8, was recorded and on that basis offences, vide Crime No. 31/2000, under Sections 362 and 323 read with Section 34 were registered. One Dr. Swati had examined P.W.2 Satyawan and the hurt certificate is at Exhibit 15, which has been proved by P.W.5 Anil Pednekar, who was working as Health Officer at Mapusa. As per Exhibit 15, there was tenderness of scalp on the right temporal region of Satyawan. He had a contused lacerated wound 2 cms. on the right eyebrow and small superficial laceration of 1 cm. on left lateral area and small abrasions on left lateral side of upper lip.

P.W.3 Vinod had injury on the left lateral side of the lip, which was simple in nature.

3. The investigation was thereafter handed over to P.W.9 P.S.I. Uday Parab, who had filed the charge-sheet against the appellants/accused.

4. Charge, vide Exhibit 4, was framed by the learned Additional Sessions Judge, Mapusa, for offences punishable under Sections 362, 367 and 323 read with Section 34 of the Indian Penal Code. The appellants/accused denied their guilt and claimed to be tried. The prosecution in support of its case examined 11 witnesses while the accused in their defence examined D.W.1 Damodar Naik and D.W.2 Vishnu Arolkar. The learned trial Judge, on consideration of the evidence, recorded a finding of conviction against the appellants/accused and sentenced them as aforestated.

5. P.W.1 Sahadev, father of P.W.2 Satyawan and P.W.3 Vinod, states that, on the day of the incident, at about 9.00 p.m., his wife Savitri, sons Satyawan, Vinod and Sanjay, his two daughters, daughter-in-law and grandchildren were in the house watching T.V.. At about 8.45 p.m., there was a knock on the door and on opening the door, he noticed two persons standing outside speaking in Hindi. Since he did not understand Hindi,

his two sons P.W.2 Satyawan and P.W.3 Vinod went to the door. After some time Vinod and Satyawan went away with the two persons. After about 5 to 10 minutes, P.W.3 Vinod came running to the house and informed the inmates that P.W.2 Satyawan had been kicked and pushed inside a white colour maruti vehicle. P.W.3 Vinod also disclosed that he was given a fist blow on his face by the two persons, who had taken Satyawan away in the car. He had, accordingly, lodged his complaint, at Exhibit 8. He has further stated that accused no. 2 had come to his house about a month prior to the incident and had threatened P.W.2 Satyawan with dire consequences. There had also been a quarrel between the wife of P.W.1 Sahadev and the sister of accused no. 2. In the said complaint, at Exhibit 8, suspicion was expressed about accused no. 2, being the person involved in the said crime, as he had threatened P.W.2 Satyawan a month earlier.

6. P.W.2 Satyawan, who is a mechanic, states that, on 10th March 2000, at about 8.45 p.m., he heard the knocking on the main door, which was opened by his father. Two persons, who were standing outside, had requested him to accompany them for repairing a vehicle. P.W.2 Satyawan accompanied by P.W.3 Vinod, therefore, went for carrying out repairs to the car, which was said to be parked about 100 metres away. On reaching the

car, while P.W.2 Satyawan had gone to start the car, one of the persons gagged his mouth and pushed Satyawan inside the car. The other person gave a kick for starting the car. According to P.W.2 Satyawan, he started the vehicle by standing outside the car. There were four more persons in the vehicle, that is, maruti van, which was white in colour. The said persons also tried to catch P.W.3 Vinod and gave a fist blow on his face but, Vinod managed to escape. According to P.W.2 Satyawan, two persons in the maruti van had worn masks while the two persons who had come to his house had not worn any mask. After pushing Satyawan inside the car, Satyawan was taken to Karaswaddo and on the way they pushed him out of the car. The persons in the maruti van had beaten him by kicks and fists after he was thrown out of the van. According to him, both the accused were in the van in which he was taken and he has identified them as they were speaking to each other in Hindi. Thereafter, he was brought to the Hotel of Krishna Ambre and later to his house. According to him, a month prior to the incident, there was a quarrel between his mother and his paternal aunt. His paternal aunt is the sister of accused no. 2. A case had been filed before the Collector, which was closed after about 5 months. In the cross-examination, he has admitted that the two persons, who had come to his house to call him, were not known to him. He has further admitted

that the four persons, who were sitting inside the car, had not got down from the vehicle when he was forcibly seated in the car. He has admitted of having stated to the police that four persons in the vehicle were wearing masks. Similarly he has also admitted to have stated in his statement that he heard the voices of the two accused while they spoke in Hindi to each other. He has also admitted 'I have not specifically (stated) to the police that I had seen the acc. in the van on the said night.' He has also admitted that the persons who had worn the masks continued wearing the masks, even when he was pushed out of the van.

7. P.W.3 Vinod has stated that, on 10th March 2000, at about 9.30 p.m., there was a knock on the door and the door was opened by his father P.W.1 Sahadev. There were two persons outside the door, who said that their vehicle was out of order and that P.W.2 Satyawan and P.W.3 Vinod should accompany them to carry out the repairs. According to him, when they went towards the car, one of the persons, who had come to their house, gave a fist blow on his nose and two other persons then pushed his brother P.W.2 Satyawan in the maruti car. There were four other persons, who were sitting in the said vehicle. They also tried to push him in the car but he managed to free himself and went home. On reaching home, he had narrated the incident to his

family members.

8. P.W.4 Krishna states that P.W.2 Satyawan had come to his house at 9.30 p.m. and he had noticed that P.W.2 Satyawan was not looking too well. He, therefore, hired a tourist taxi and arranged to drop P.W.2 Satyawan and his cousin Amar to their house.

9. P.W.6 Lalita Naroji, wife of P.W.2 Satyawan, has also deposed in the same vein as P.W.2 Satyawan. In the cross-examination she has admitted that a month earlier to the incident, her husband P.W.2 Satyawan and P.W.3 Vinod were arrested by Pernem Police on the allegation of assault on the sister of accused no. 1. She denied the suggestion that accused no. 1 Vinayak had not threatened Satyawan.

10. P.W.7 Shrikant Parsekar is the driver of the taxi in which P.W.2 Satyawan was brought home.

11. P.W.10 Madan Naroji, who is a relative of P.W.2 Satyawan, states that he was residing at a distance of 30 metres from the house of Satyawan. On the day of the incident, at about 8.45 p.m., he had seen one maruti vehicle parked at a distance of 40 metres from his house. He heard the shouts of the family members of P.W.2 Satyawan. He had accompanied P.W.1

Sahadev to the police station for lodging the report. He had lodged the report, which is at Exhibit 23.

12. The learned trial Judge has held that the identity of the appellants/accused was established on the basis of their voices, as the evidence of P.W.2 Satyawan was that he had heard the two persons, who were wearing masks, speaking Hindi. The learned Judge, in paragraph 19 of the Judgment, held that the accused were known to P.W.2 Satyawan and the statement of Satyawan that he recognized their voices had not been shaken and his testimony had remained unrebutted. The learned trial Court, therefore, relying on the Judgment in **Sainudeen v. State of Kerala**, 1992 CRI.L.J. 1644, convicted and sentenced the accused as aforestated.

13. Mr. Lotlikar, the learned senior counsel appearing for the appellants/accused, has urged before me that identification by voice is extremely risky and the Courts should not accept the identification unless the identification is backed by some corroborative evidence. He has further urged before me that the evidence of the prosecution witnesses does not disclose that the appellants/accused were frequent visitors to the house of P.W.2 Satyawan and, therefore, despite the appellants/accused wearing masks, Satyawan was able to identify the appellants/accused on the basis of their

voices. The learned Public Prosecutor appearing on behalf of the State has supported the Judgment.

14. In **Nga Aung Khin v. Emperor**, A.I.R. 1937 Rangoon 407, it is held it is never safe to rely on the identification of a person by his voice. One is always liable to make a mistake. The Apex Court in **Kirpal Singh v. The State of Uttar Pradesh**, A.I.R. 1965 S.C. 712, has held that it is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognizing is not familiar with the person recognized may be some what risky in a criminal trial.

15. The learned Judges of the Division Bench of the Kerala High Court in Sainudeen v. State of Kerala (Supra) has accepted the identification of the accused therein on the basis of his voice. The learned Judges found that the evidence of three witnesses, who were neighbours, that they had heard the conversation between the appellant and the deceased, could be relied upon. The said three witnesses had also seen the accused in the said case going out after closing the door. Thus, apart from the fact that the accused therein was identified on the basis of his voice, there was other material to show that the accused had entered the house of the deceased.

16. In the present case neither P.W.1 Sahadev, P.W.2 Satyawan nor P.W.3 Vinod state that the accused were frequent visitors to their house. Though the accused no. 2 is stated to be the brother of the paternal aunt of P.W.2 Satyawan, the evidence does not suggest that the accused was a frequent visitor to their house. An incident of about one month back is referred to by the witnesses to suggest the motive for commission of the offence. In fact, the needle of suspicion pointed out in the First Information Report, at Exhibit 8, against the accused, was merely on the basis of a threat alleged to have been given by the accused no. 2 about a month prior to the incident. The evidence of P.W.2 Satyawan that he had identified the accused on the basis of their voice is far from satisfactory. The accused are stated to have been wearing masks. P.W.2 Satyawan does not say that he was familiar with the pitch and timbre of the voice and, therefore, with reasonable degree of certainty identified the accused. Identification of the accused on the basis of his voice is extremely risky. The conviction can be based on the basis of the identification by voice if there is other corroborative evidence. A conviction could also be based on the sole circumstance of identification of the accused by his voice if the evidence in that regard is of sterling quality and inspires the confidence of the Court. For an identification on the basis of the voice

to be accepted by the Court or to be made a foundation of conviction, the Court must be satisfied that the witness, who has identified the accused by his voice, was familiar with the voice of the accused. Stray acquaintances cannot enable a witness to identify an accused on the basis of his voice. As, in this case, P.W.2 Satyawan in his examination-in-chief does not state about the threat given by the accused no. 2. In the cross-examination he has admitted that he had lodged a report to the police against accused no. 2 for issuing threats to him. The said report, for some inexplicable reasons, has not been produced by the prosecution. Though P.W.1 Sahadev has stated that accused no. 2 had come to their house and had threatened Satyawan, P.W.2 Satyawan does not speak about the visit of accused no. 2 to his house. P.W.2 Satyawan only speaks about the case being filed against him and others in respect of a quarrel between his mother and his paternal aunt, that is, sister of accused no. 2. In fact, he has admitted in the cross-examination that he had not specifically stated in his statement that he had seen the accused in the van on that night.

17. For all these reasons, according to me, it is extremely unsafe to accept the evidence of the witnesses regarding the identification of the accused based on

their voices.

18. The accused have examined two witnesses in respect of their alibi. Even if that evidence is not taken into consideration, according to me, since the prosecution has not been able to establish the participation of the accused in the said crime, the accused are entitled to be given the benefit of doubt.

19. Criminal Appeal is, therefore, accordingly allowed. The conviction and sentence passed by the learned Additional Sessions Judge, Mapusa, in Sessions Case No. 50 of 2000, is, hereby, quashed and set aside and the accused are acquitted of the offences with which they have been charged and convicted.

(P.V. HARDAS)
JUDGE.

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